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CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. Maritime Boundary Treaty with Micronesia

On August 1, 2014, the United States and the Federated States of Micronesia ("FSM") signed a treaty formally defining their maritime boundary, located between the Caroline Islands of the FSM and the U.S. territory of Guam. The treaty was signed in Palau during the Pacific Islands Forum leaders' meeting. This treaty applies principles of jurisdiction and limits under international law as reflected in the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"). The maritime boundary treaty, with appropriate technical adjustments, formalizes a boundary that had been informally adhered to by the two countries previously on the basis of the principle of equidistance, such that the line is equal in distance from each country. The boundary is 828 kilometers (447 nautical miles) in length. The treaty will enter into force upon the exchange of diplomatic notes indicating that each party has completed internal procedures necessary for entry into force, which for the United States requires ratification subject to the advice and consent of the U.S. Senate. The treaty is available at *www.state.gov/s/l/c8183.htm*.

2. Continental Shelf

In November 2014, the U.S. Mission to the UN delivered two separate notes to the UN Secretariat regarding earlier submissions made to the Commission on the Limits of the Continental Shelf ("CLCS") by Canada and the Bahamas in December 2013 and April 2014, respectively. Excerpts follow, first, from the U.S. note relating to Canada's submission, and second, from the U.S. note relating to the Bahamas' submission.

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The United Nations Convention on the Law of the Sea, including its Annex II, and the Rules of Procedure of the Commission, in particular Annex I thereto, provide that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

The United States has taken note of the overlap between areas of continental shelf extending beyond 200 nautical miles (nm) from Canada and areas of continental shelf extending beyond 200 nm from United States territory in the Atlantic Ocean. The United States further takes note of the statement in Section 7 of the Executive Summary of the partial submission of Canada stating that "During the preparation of this submission, regular consultations between Canada and the United States of America revealed overlaps in their respective continental shelves . . ." and that "Canada has been advised by the United States that it does not object to the consideration of Canada's submission…."

With reference to the Executive Summary of the partial submission of Canada, particularly the aforementioned statement in its Section 7, the Government of the United States confirms that it does not object to Canada's request that the Commission consider the documentation in its partial submission regarding its continental shelf in the Atlantic Ocean and make its recommendation on the basis of this documentation, to the extent that such recommendations are without prejudice to the establishment of the outer limits of its continental shelf by the United States, or to any final delimitation of the continental shelf concluded subsequently in these areas between Canada and the United States.

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The United Nations Convention on the Law of the Sea, including its Annex II, and the Rules of Procedure of the Commission, in particular Annex I thereto, provide that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. In particular, Annex I to the Commission's Rules of Procedure recognizes, and the United States concurs, "that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States."

The United States takes note of paragraph 2.2 of the Executive Summary of the Submission, which states in part that "The Bahamas confirms that the area of continental shelf that forms the basis of the Submission is not the subject of any dispute with any other State." Contrary to this statement, the area described in the Submission is the subject of a maritime dispute with the United States.

The United States notes further that paragraph 2.3 of the Executive Summary "notes that the establishment of agreed maritime boundaries between The Bahamas and the United States of America is presently subject to negotiation and final delimitation" and that the "Submission is made without prejudice to the delimitation of outstanding maritime boundaries between The Bahamas and the United States of America." Notwithstanding the intention of The Bahamas, the United States considers that consideration of the Submission by the Commission would be

prejudicial with respect to the rights of the United States in the area in question and the delimitation of the maritime boundary between the United States and The Bahamas.

Accordingly, the United States requests the Commission not to consider the Submission of The Bahamas, in accordance with Article 5(a) of Annex I to its Rules of Procedure, which states the following: "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute." At this time, the United States is unable to consent to the consideration by the Commission of the Submission of the Commonwealth of The Bahamas. The United States intends to keep this matter under active consideration in connection with ongoing efforts to delimit the maritime boundary between the United States and The Bahamas.

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3. South China Sea and East China Sea

On February 5, 2014, Daniel R. Russel, Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs, testified before the Subcommittee on Asia and the Pacific of the Committee on Foreign Affairs of the U.S. House of Representatives. Excerpts from Assistant Secretary Russel's testimony relating to the South China Sea appear below. His full testimony is available at *www.state.gov/p/eap/rls/rm/2014/02/221293.htm*.

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The Members of this Subcommittee know well the importance of the Asia-Pacific region to American interests. …

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Since the end of the Second World War, a maritime regime based on international law that promotes freedom of navigation and lawful uses of the sea has facilitated Asia's impressive economic growth. … As a maritime nation with global trading networks, the United States has a national interest in freedom of the seas and in unimpeded lawful commerce. From President Thomas Jefferson's actions against the Barbary pirates to President Reagan's decision that the United States will abide by the Law of the Sea Convention's provisions on navigation and other traditional uses of the ocean, American foreign policy has long defended the freedom of the seas. And as we consistently state, we have a national interest in the maintenance of peace and stability; respect for international law; unimpeded lawful commerce; and freedom of navigation and overflight in the East China and South China Seas.

For all these reasons, the tensions arising from maritime and territorial disputes in the Asia-Pacific are of deep concern to us and to our allies. Both the South China and East China

Seas are vital thoroughfares for global commerce and energy. … A simple miscalculation or incident could touch off an escalatory cycle. …

Accordingly, we have consistently emphasized in our diplomacy in the region as well as in our public messaging the importance of exercising restraint, maintaining open channels of dialogue, lowering rhetoric, behaving safely and responsibly in the sky and at sea, and peacefully resolving territorial and maritime disputes in accordance with international law. We are working to help put in place diplomatic and other structures to lower tensions and manage these disputes peacefully. We have sought to prevent provocative or unilateral actions that disrupt the status quo or jeopardize peace and security. When such actions have occurred, we have spoken out clearly and, where appropriate, taken action. In an effort to build consensus and capabilities in support of these principles, the administration has invested considerably in the development of regional institutions and bodies such as the ASEAN Regional Forum, the ASEAN Defense Ministers Meeting Plus, the East Asia Summit, and the Expanded ASEAN Maritime Forum. These forums, as they continue to develop, play an important role in reinforcing international law and practice and building practical cooperation among member states.

In the South China Sea, we continue to support efforts by ASEAN and China to develop an effective Code of Conduct. Agreement on a Code of Conduct is long overdue and the negotiating process should be accelerated. This is something that China and ASEAN committed to back in 2002 when they adopted their Declaration on the Conduct of Parties in the South China Sea. An effective Code of Conduct would promote a rules-based framework for managing and regulating the behavior of the relevant countries in the South China Sea. A key part of that framework, which we and many others believe should be adopted quickly, is inclusion of mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.

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China's announcement of an Air Defense Identification Zone (ADIZ) over the East China Sea in November was a provocative act and a serious step in the wrong direction. The Senkakus are under the administration of Japan and unilateral attempts to change the status quo raise tensions and do nothing under international law to strengthen territorial claims. The United States neither recognizes nor accepts China's declared East China Sea ADIZ and has no intention of changing how we conduct operations in the region. China should not attempt to implement the ADIZ and should refrain from taking similar actions elsewhere in the region.

Mr. Chairman, we have a deep and long-standing stake in the maintenance of prosperity and stability in the Asia-Pacific and an equally deep and abiding long-term interest in the continuance of freedom of the seas based on the rule of law—one that guarantees, among other things, freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms. International law makes clear the legal basis on which states can legitimately assert their rights in the maritime domain or exploit marine resources. By promoting order in the seas, international law is instrumental in safeguarding the rights and freedoms of all countries regardless of size or military strength.

I think it is imperative that we be clear about what we mean when the United States says that we take no position on competing claims to sovereignty over disputed land features in the East China and South China Seas. First of all, we do take a strong position with regard to behavior in connection with any claims: we firmly oppose the use of intimidation, coercion or force to assert a territorial claim. Second, we do take a strong position that maritime claims must accord with customary international law. This means that all maritime claims must be derived from land features and otherwise comport with the international law of the sea. So while we are not siding with one claimant against another, we certainly believe that claims in the South China Sea that are not derived from land features are fundamentally flawed. In support of these principles and in keeping with the longstanding U.S. Freedom of Navigation Program, the United States continues to oppose claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.

As I just noted, we care deeply about the way countries behave in asserting their claims or managing their disputes. We seek to ensure that territorial and maritime disputes are dealt with peacefully, diplomatically and in accordance with international law. Of course this means making sure that shots aren't fired; but more broadly it means ensuring that these disputes are managed without intimidation, coercion, or force. We have repeatedly made clear that freedom of navigation is reflected in international law, not something to be granted by big states to others. President Obama and Secretary Kerry have made these points forcefully and clearly in their interactions with regional leaders, and I—along with my colleagues in the State Department, Defense Department, the National Security Council and other agencies—have done likewise.

We are also candid with all the claimants when we have concerns regarding their claims or the ways that they pursue them. Deputy Secretary Burns and I were in Beijing earlier this month to hold regular consultations with the Chinese government on Asia-Pacific issues, and we held extensive discussions regarding our concerns. These include continued restrictions on access to Scarborough Reef; pressure on the long-standing Philippine presence at the Second Thomas Shoal; putting hydrocarbon blocks up for bid in an area close to another country's mainland and far away even from the islands that China is claiming; announcing administrative and even military districts in contested areas in the South China Sea; an unprecedented spike in risky activity by China's maritime agencies near the Senkaku Islands; the sudden, uncoordinated and unilateral imposition of regulations over contested airspace in the case of the East China Sea Air Defense Identification Zone; and the recent updating of fishing regulations covering disputed areas in the South China Sea. These actions have raised tensions in the region and concerns about China's objectives in both the South China and the East China Seas.

There is a growing concern that this pattern of behavior in the South China Sea reflects an incremental effort by China to assert control over the area contained in the so-called "nine-dash line," despite the objections of its neighbors and despite the lack of any explanation or apparent basis under international law regarding the scope of the claim itself. China's lack of clarity with regard to its South China Sea claims has created uncertainty, insecurity and instability in the region. It limits the prospect for achieving a mutually agreeable resolution or equitable joint development arrangements among the claimants. I want to reinforce the point that under international law, maritime claims in the South China Sea must be derived from land features. Any use of the "nine dash line" by China to claim maritime rights not based on claimed land features would be inconsistent with international law. The international community would

welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.

We support serious and sustained diplomacy between the claimants to address overlapping claims in a peaceful, non-coercive way. This can and should include bilateral as well as multilateral diplomatic dialogue among the claimants. But at the same time we fully support the right of claimants to exercise rights they may have to avail themselves of peaceful dispute settlement mechanisms. The Philippines chose to exercise such a right last year with the filing of an arbitration case under the Law of the Sea Convention.

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In the meantime, a strong diplomatic and military presence by the United States, including by strengthening and modernizing our alliances and continuing to build robust strategic partnerships, remains essential to maintain regional stability. This includes our efforts to promote best practices and good cooperation on all aspects of maritime security and bolster maritime domain awareness and our capacity building programs in Southeast Asia. The Administration has also consistently made clear our desire to build a strong and cooperative relationship with China to advance peace and prosperity in the Asia-Pacific, just as we consistently have encouraged all countries in the region to pursue positive relations with China. And this includes working with all countries in the region to strengthen regional institutions like ASEAN and the East Asia Summit as venues where countries can engage in clear dialogue with all involved about principles, values and interests at stake, while developing cooperative activities—like the Expanded ASEAN Seafarers Training initiative we recently launched—to build trust and mechanisms to reduce the chances of incidents.

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On February 14, 2014, Secretary Kerry summarized meetings he held in Beijing with Chinese leaders, including President Xi Jinping and the premier, the state councilor, and the foreign minister concerning multiple subject of concern between the United States and China. His summary included references to discussions about the South China Sea, excerpted below. Secretary Kerry's comments to the press in Beijing on February 14, 2014 are available in full at *www.state.gov/secretary/remarks/2014/02/221658.htm*.

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I also expressed our concern about the need to try to establish a calmer, more rule-of-law-based, less confrontational regime with respect to the South China Sea, and the issues with respect to both the South China Sea and the East China Sea. And this includes the question of how an ADIZ might or might not come about. We certainly expressed the view that it's important for us to cooperate on these kinds of things, to have notice, to work through these things, and to try to do them in a way that can achieve a common understanding of the direction that we're moving

in, and hopefully a common acceptance of the steps that are or are not being taken. Certainly, with respect to the South China Sea, it's important to resolve these differences in a peaceful, non-confrontational way that honors the law of the sea and honors the rule of law itself. And we encourage steps by everybody—not just China, by all parties—to avoid any kind of provocation or confrontation and to work through the legal tools available.

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…[W]e did discuss this specific road ahead with respect to resolving these claims in the South China Sea. And the Chinese have made clear that they believe they need to be resolved in a peaceful and legal manner, and that they need to be resolved according to international law and that process.

And I think they believe they have a strong claim, a claim based on history and based on fact. They're prepared to submit it, and—but I think they complained about some of the provocations that they feel others are engaged in. And that is why I've said all parties need to refrain from that. Particularly with respect to some of the islands and shoals, they feel there have been very specific actions taken in order to sort of push the issue of sovereignty on the sea itself or by creating some construction or other kinds of things.

So the bottom line is there was a very specific statement with respect to the importance of rule of law in resolving this and the importance of legal standards and precedent and history being taken into account to appropriately make judgments about it.

With respect to the ADIZ, we have, indeed, made clear our feelings about any sort of unilateral announcements. And I reiterated that again today. And I think hopefully that whatever falls in the future will be done in an open, transparent, accountable way that is inclusive of those who may or may not be concerned about that kind of action. But we've made it very clear that a unilateral, unannounced, unprocessed initiative like that can be very challenging to certain people in the region and therefore to regional stability. And we urge our friends in China to adhere to the highest standards of notice, engagement, involvement, information sharing, in order to reduce any possibilities of misinterpretation in those kinds of things.

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On February 17, 2014, Secretary Kerry touched on U.S. policy with respect to the South China Sea during remarks he made at the 4th Joint Ministerial Commission between Indonesia and the United States in Jakarta, Indonesia. Excerpts from the Secretary's remarks appear below. The remarks are available at *www.state.gov/secretary/remarks/2014/02/221711.htm*.

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…I was in Beijing just two days ago, where I discussed the United States growing concerns over a pattern of behavior in which maritime claims are being asserted in the East China and South China Sea, from restrictions on access to the Scarborough Shoals, the Scarborough Reef, to

China's establishment of an ADIZ in the East China Sea, to the issuance of revised regulations restricting fishing in disputed areas of the South China Sea.

We believe very strongly that international law applies to all countries, big countries, small countries. And …even though the United States has not ratified the Law of the Sea [Convention], we live by the Law of the Sea. We are pledged to stick with the rules of the Law of the Sea. And we think it's important for all countries to do that. It is imperative for all claimants to any location in these seas to base their maritime claims on the definitions of international law and to be able to resolve them peacefully within that framework.

The United States is very grateful for the leadership and the role that Indonesia has played in advancing China-ASEAN negotiations on a code of conduct in the South China Sea. It's not an exaggeration to say that the region's future stability will depend, in part, on the success and the timeliness of the effort to produce a code of conduct. The longer the process takes, the longer tensions will simmer, and the greater the chance of a miscalculation by somebody that could trigger a conflict. That is in nobody's interest. So I commend Foreign Minister Natalegawa for his focus on this issue. And I urge all of the parties to follow his lead and accelerate the negotiations.

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On March 30, 2014, the Republic of the Philippines submitted a memorial in its arbitration case concerning competing claims in the South China Sea. The U.S. Department of State issued a press statement on March 30, available at *www.state.gov/r/pa/prs/ps/2014/03/224150.htm*, in which it reaffirmed U.S. support for the use of peaceful means of resolving maritime disputes such as the one that is the subject of the arbitration initiated by the Philippines. The press statement also includes the following:

> All countries should respect the right of any States Party, including the Republic of the Philippines, to avail themselves of the dispute resolution mechanisms provided for under the Law of the Sea Convention. We hope that this case serves to provide greater legal certainty and compliance with the international law of the sea.

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The U.S. Department of State issued a press statement on May 7, 2014 regarding China's decision to introduce an oil rig and additional government vessels into waters disputed with Vietnam. The press statement is available at *www.state.gov/r/pa/prs/ps/2014/05/225750.htm* and includes the following:

> China's decision to introduce an oil rig accompanied by numerous government vessels for the first time in waters disputed with Vietnam is provocative and raises tensions. This unilateral action appears to be part of a broader pattern of

Chinese behavior to advance its claims over disputed territory in a manner that undermines peace and stability in the region.

We are also very concerned about dangerous conduct and intimidation by vessels operating in this area. We call on all parties to conduct themselves in a safe and professional manner, preserve freedom of navigation, exercise restraint, and address competing sovereignty claims peacefully and in accordance with international law.

Sovereignty over the Paracel Islands is disputed; this incident is occurring in waters claimed by Vietnam and China near those islands. These events highlight the need for claimants to clarify their claims in accordance with international law, and to reach agreement on appropriate behavior and activities in disputed areas.

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On November 4, 2014, Secretary Kerry delivered a speech at the Johns Hopkins School of Advanced International Studies on U.S.-China Relations. His remarks are available at *www.state.gov/secretary/remarks/2014/11/233705.htm*. The following excerpt from Secretary Kerry's speech relates to the South and East China Seas:

> And when we talk about managing our differences, that is not code for agree to disagree. For example, we do not simply agree to disagree when it comes to maritime security, especially in the South and East China Seas. The United States is not a claimant, and we do not take a position on the various territorial claims of others. But we take a strong position on how those claims are pursued and how those disputes are going to be resolved. So we are deeply concerned about mounting tension in the South China Sea and we consistently urge all the parties to pursue claims in accordance with international law, to exercise self-restraint, to peacefully resolve disputes, and to make rapid, meaningful progress to complete a code of conduct that will help reduce the potential for conflict in the years to come. And the United States will work, without getting involved in the merits of the claim, on helping that process to be effectuated, because doing so brings greater stability, brings more opportunity for cooperation in other areas.

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On December 5, 2014, the U.S. Department of State published an analysis of China's maritime claims in the South China Sea, which is available at *www.state.gov/e/oes/ocns/opa/c16065.htm*. The report is one of a series issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State which examines coastal State's maritime claims and/or boundaries to provide the views of the United States

> Government regarding the consistency of such claims with international law. The excerpts from the report reproduced below (with footnotes omitted) explain more precisely the potential interpretations of China's claims analyzed in the study, and the legal basis for those interpretations.

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This study analyzes the maritime claims of the People's Republic of China in the South China Sea, specifically its "dashed-line" claim encircling islands and waters of the South China Sea.

In May 2009, the Chinese Government communicated two Notes Verbales to the UN Secretary General requesting that they be circulated to all UN Member States. The 2009 Notes, which contained China's objections to the submissions by Vietnam and Malaysia (jointly) and Vietnam (individually) to the Commission on the Limits of the Continental Shelf, stated the following:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.

The map referred to in China's Notes, which is reproduced as Map 1 to this study, depicted nine line segments (dashes) encircling waters, islands, and other features of the South China Sea. Vietnam, Indonesia, and the Philippines subsequently objected to the contents of China's 2009 Notes, including by asserting that China's claims reflected in the dashed-line map are without basis under the international law of the sea. In 2011, China requested that another Note Verbale be communicated to UN Member States, which reiterated the first sentence excerpted above, and added that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence."

China has not clarified through legislation, proclamation, or other official statements the legal basis or nature of its claim associated with the dashed-line map. Accordingly, this *Limits in the Seas* study examines several possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea.

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With respect to maritime claims, China's position is unclear. Therefore, this study examines below three possible interpretations of the dashed-line claim and the extent to which those interpretations are consistent with the international law of the sea. These alternative interpretations are identified with reference to primary sources, notably the official statements and acts of the People's Republic of China.

1. Dashed Line as a Claim to Islands

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Under this possible interpretation, the dashed line indicates only the islands over which China claims sovereignty. It is not unusual to draw lines at sea on a map as an efficient and practical means to identify a group of islands. If the map depicts only China's land claims, then China's maritime claims, under this interpretation, are those provided for in the LOS Convention.

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Setting aside issues related to competing sovereignty claims over land features and unresolved maritime boundaries in the South China Sea, if the above interpretation of China's dashed-line claim is accurate, then the maritime claims provided for in China's domestic laws could generally be interpreted to be consistent with the international law of the sea, as follows:

1. *China's mainland coast and Hainan Island* are entitled to a territorial sea, contiguous zone, EEZ, and continental shelf, including in areas that project into the South China Sea.

2. *Other islands*, as defined by Article 121(1) of the LOS Convention, claimed by China in the South China Sea would likewise be entitled to the above-mentioned maritime zones. Under Article 121(3) islands that constitute "rocks which cannot sustain human habitation or economic life of their own" would not be entitled to an EEZ and a continental shelf.

3. *Submerged features*, namely those that are not above water at high tide, are not subject to sovereignty claims and generate no maritime zones of their own. They are subject to the regime of the maritime zone in which they are found.

4. *Artificial islands, installations, and structures* likewise do not generate any territorial sea or other maritime zones.

This assessment is subject to several important caveats.

First, China's sovereignty claims over islands in the South China Sea are disputed. The Paracel Islands are also claimed by Vietnam and Taiwan; Scarborough Reef is also claimed by the Philippines and Taiwan; and some or all of the Spratly Islands are also claimed by Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Because China's land claims are disputed, its maritime claims described above that are based on those land claims are likewise disputed.

Second, China has not yet clarified its maritime claims related to certain geographic features in the South China Sea. For instance, China has not clarified which features in the South China Sea it considers to be "islands" (or, alternatively, submerged features) and also which, if any, "islands" it considers to be "rocks" that are not entitled to an EEZ or a continental shelf under paragraph 3 of Article 121 of the LOS Convention. With respect to Scarborough Reef and certain features in the Spratly Islands, these issues are the subject of arbitration proceedings between the Philippines and China under Annex VII of the LOS Convention.

Third, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei have maritime zones that extend from their mainland shores into the South China Sea. Assuming for the sake of argument that China has sovereignty over all the disputed islands in the South China Sea,

maritime zones generated by South China Sea islands would overlap with those generated by the opposing coastlines of the aforementioned States.

2. Dashed Line as a National Boundary

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Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a national boundary between China and neighboring States.

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Articles 74 and 83 of the LOS Convention provide with respect to the EEZ and continental shelf that boundary delimitation "shall be effected by agreement on the basis of international law …in order to achieve an equitable solution." Because maritime boundaries under international law are created by agreement (or judicial decision) between neighboring States, one country may not unilaterally establish a maritime boundary with another country. Assuming for the sake of argument that China has sovereignty over all the disputed islands, the maritime boundaries delimiting overlapping zones would need to be negotiated with the States with opposing coastlines—Vietnam, the Philippines, Malaysia, Indonesia, and Brunei. The dashes also lack other important hallmarks of a maritime boundary, such as a published list of geographic coordinates and a continuous, unbroken line that separates the maritime space of two countries.

To the extent the dashed line indicates China's unilateral position on the proper location of a maritime boundary with its neighbors, such a position would run counter to State practice and international jurisprudence on maritime boundary delimitation. In determining the position of maritime boundaries, States and international courts and tribunals typically accord very small islands far from a mainland coast like those in the South China Sea equal or less weight than opposing coastlines that are long and continuous. (Map 4 above shows selected locations where the dashes are considerably closer to the coasts of other States than to the South China Sea islands claimed by China.)

If the dashed line is intended to depict a unilateral maritime boundary claim, this interpretation also does not address the related question of what kind of rights or jurisdiction China is asserting for itself within the line. The dashed line, to be consistent with international law, cannot represent a limit on China's territorial sea (and, therefore, its sovereignty), as the dashes are located beyond the 12-nm maximum limit of the territorial sea of Chinese-claimed land features. Moreover, dashes 2, 3, and 8 are not only relatively close to the mainland shores of other States, all or part of those dashes are also beyond 200 nm from any Chinese-claimed land feature. The dashed line therefore cannot represent the seaward limit of China's EEZ consistent with Article 57 of the LOS Convention, which states that the breadth of the EEZ "shall not extend beyond 200 nautical miles" from coastal baselines.

3. Dashed Line as a Historic Claim

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Under this possible interpretation, the dashed line that appears on Chinese maps is intended to indicate a so-called "historic" claim. A historic claim might be one of sovereignty over the maritime space ("historic waters" or "historic title") or, alternatively, some lesser set of rights ("historic rights") to the maritime space.

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The assessment below examines whether there is a basis under international law for a Chinese claim to historic waters or historic rights to the waters within the dashed line.

Assessment Part 1 – Has China Made a Historic Claim?

As a threshold matter, as the preceding discussion suggests, China has not actually made a cognizable claim to either "historic waters" or "historic rights" to the waters of the South China Sea within the dashed line. A State making a historic claim must give international notoriety to such a claim. As stated in a recent comprehensive study on historic waters, "*formal notification* of such [a historic] claim would seem normally to be necessary for it to attain sufficient notoriety; so that, at the very least, other States may have the opportunity to deny any acquiescence with the claim by protest etc."

With respect to the South China Sea, there appears to be no Chinese law, declaration, proclamation, or other official statement describing and putting the international community on notice of a historic claim to the waters within the dashed line. The reference to "historic rights" in China's 1998 EEZ and continental shelf law is, as a legal matter, a "savings clause"; the statement makes no claim in itself, and the law contains no reference to the dashed-line map. Although certain Chinese laws and regulations refer to "other sea areas under the jurisdiction of the People's Republic of China," there is no indication of the nature, basis, or geographic location of such jurisdiction, nor do those laws refer to "historic" claims of any kind. While China's 2011 Note Verbale states that "historical and legal evidence" support China's "sovereignty and related rights and jurisdiction," that Note, like the 1998 EEZ and continental shelf law, is not a statement of a claim itself. Furthermore, the "historical ... evidence" could refer to China's sovereignty claim to the islands, and not the waters.

The mere publication by China of the dashed-line map in 1947 could not have constituted official notification of a maritime claim. China's "Map of South China Sea *Islands*" made no suggestion of a maritime claim, and its domestic publication in the Chinese language was not an act of sufficient international notoriety to have properly alerted the international community to such a claim, even if it had asserted one. The various maps published by China also lack the precision, clarity, and consistency that could convey the nature and scope of a maritime claim. The International Court of Justice's (ICJ) "statement of a principle" in the *Frontier Dispute* between Burkina Faso and Mali describes the legal force of maps as follows:

> Whether in frontier delimitations or international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.

China's 1958 Territorial Sea Declaration also contradicts the view that China has made a claim of either "historic waters" or "historic rights" within the dashed line. That declaration refers to the "high seas" separating China's mainland and coastal islands from "all other islands belonging to China." The notion of "high seas" as juridically distinct from any kind of national waters and not subject to national appropriation or exclusive use was an established rule of international law for centuries before China's 1958 Declaration. Further, to the extent the 1958 Declaration makes a historic claim, it is to a different body of water—Bo Hai (Pohai), a gulf in northeastern China. Had China considered in 1958 that the waters within the dashed line published on its maps constituted China's historic waters, it would presumably have referenced this in its 1958 Declaration along with its claim regarding Bo Hai. Instead, the contents of that Declaration, particularly the reference to "high seas," indicate that China did not consider the waters within the dashed line to have a historic character.

The international community has largely regarded China's dashed-line map in a manner consistent with this view. Indeed, a comprehensive study on historic waters published in 2008 did not even discuss China's dashed line, nor has the dashed line been identified in U.S. Government compendiums of historic waters claims in the public domain. Formal international protest of the dashed line began only after China's issuance in 2009 of its Notes Verbales described earlier in this study.

Assessment Part 2 – Would a Historic Claim have Validity?

China has not advanced a cognizable historic claim of either sovereignty over the maritime space within the dashed line ("historic waters" or "historic title") or a lesser set of rights ("historic rights") in that maritime space. If China nevertheless does consider that the dashed line appearing on its maps indicates a historic claim, such a claim would be contrary to international law.

Arguments in favor of China's historic claims often note that the LOS Convention recognizes such claims. A Chinese claim of historic waters or historic rights within the dashed-line would not be recognized by the Convention, however. The text and drafting history of the Convention make clear that, apart from a narrow category of near-shore "'historic' bays" (Article 10) and "historic title" in the context of territorial sea boundary delimitation (Article 15), the modern international law of the sea does not recognize history as the basis for maritime jurisdiction. A Chinese historic claim in the South China Sea would encompass areas distant from Chinese-claimed land features, and would therefore implicate the Convention's provisions relating to the EEZ, continental shelf, and possibly high seas. Unlike Articles 10 and 15, the

Convention's provisions relating to these maritime zones do not contain any exceptions for historic claims in derogation of the sovereign rights and jurisdiction of a coastal State or the freedoms of all States.

Because the Convention's provisions relating to the EEZ, continental shelf, and high seas do not contain exceptions for historic claims, the Convention's provisions prevail over any assertion of historic claims made in those areas. The 1962 study on historic waters commissioned by the Conference that adopted the 1958 Geneva Conventions reached this same conclusion with respect to interpretation of the 1958 Convention on the Territorial Sea and Contiguous Zone. The 1982 LOS Convention continued this approach by retaining provisions related to historic bays and titles that are substantively identical to those contained in the 1958 Convention. Had the drafters of the LOS Convention intended to permit historic claims of one State to override the expressly stated rights of other States, the Convention would have reflected this intention in its text. Instead, as with the 1958 Convention, the LOS Convention limits the relevance of historic claims to bays and territorial sea delimitation.

Accordingly, with regard to possible Chinese "historic rights" in the South China Sea, any such rights would therefore need to conform to the Convention's provisions that deal with the relevant activities. Rules of navigation are set out in the Convention, and these rules reflect traditional navigational uses of the sea. Rules related to oil and gas development are also set forth in the Convention, without exception for historic rights in any context. Also, rules for fishing are set out in the Convention, including limited rules pertaining to historic uses that do not provide a basis for sovereignty, sovereign rights, or jurisdiction. As the *Gulf of Maine* Chamber of the International Court of Justice noted in its 1984 judgment, the advent of exclusive jurisdiction of a coastal State over fisheries within 200 nm of its coast overrides the prior usage and rights of other States in that area.

It has also been argued that "historic title" and "historic rights" are "matters not regulated by this Convention [and thus] continue to be governed by the rules and principles of general international law" outside of the LOS Convention. This position is not supported by international law and misunderstands the comprehensive scope of the LOS Convention. The Convention sets forth the legal regimes for all parts of the ocean. As discussed above, matters such as navigation, hydrocarbon development, and fishing are in fact "regulated by th[e] Convention." Therefore, a State may not derogate from the Convention's provisions on such matters by claiming historic waters or historic rights under "general international law." Although one may need to refer to "general international law" to identify the meaning of particular terms in the Convention—such as references to historic bays and historic title in Articles 10 and 15, respectively—the Convention does not permit a State to resort to "general international law" as an alternative basis for maritime jurisdiction that conflicts with the Convention's express provisions related to maritime zones.

Even assuming that a Chinese historic claim in the South China Sea were governed by "general international law" rather than the Convention, the claim would still need to be justified under such law. In this regard, a Chinese historic waters claim in the South China Sea would not pass any element of the three-part legal test described above under the Basis of Analysis:

> (1) *No open, notorious, and effective exercise of authority over the South China Sea.* China did not communicate the nature of its claim within the dashed line during the period when China might purport to have established a historic claim; indeed, the nature of Chinese authority claimed within the dashed line still has not been clarified. Likewise,

China has not established its claims with geographical consistency and precision. As such, it cannot satisfy the "open" or "notorious" requirements for a valid claim to historic waters.

(2) *No continuous exercise of authority in the South China Sea.* There has long been widespread usage of the South China Sea by other claimants in a manner that would not be consistent with Chinese sovereignty or exclusive jurisdiction. Many islands and other features in the South China Sea are occupied not just by China, but by Malaysia, the Philippines, Vietnam, and Taiwan, and the mainland maritime claims of Malaysia, the Philippines, Brunei, Indonesia, and Vietnam also project into the South China Sea. These countries have all undertaken activities, such as fishing and hydrocarbon exploration, in their claimed maritime space that are not consistent with "effective" or "continuous exercise" of Chinese sovereignty or exclusive rights over that space.

(3) *No acquiescence by foreign States in China's exercise of authority in the South China Sea.* No State has recognized the validity of a historic claim by China to the area within the dashed line. Any alleged tacit acquiescence by States can be refuted by the lack of meaningful notoriety of any historic claim by China, discussed above. A claimant State therefore cannot rely on nonpublic or materially ambiguous claims as the foundation for acquiescence, but must instead establish its claims openly and publicly, and with sufficient clarity, so that other States may have actual knowledge of the nature and scope of those claims. In the case of the dashed line, upon the first official communication of a dashed-line map to the international community in 2009, several immediately affected countries formally and publicly protested. The practice of the United States is also notable with respect to the lack of acquiescence. Although the U.S. Government is active in protesting historic claims around the world that it deems excessive, the United States has not protested the dashed line on these grounds because it does not believe that such a claim has been made by China. Rather, the United States has requested that the Government of China clarify its claims.

The fact that China's claims predate the LOS Convention does not provide a basis under the Convention or international law for derogating from the LOS Convention. The Convention's preamble states that it is intended to "settle … all issues relating to the law of the sea" and establish a legal order that promotes stability and peaceful uses of the seas. Its object and purpose is to set forth a comprehensive, predictable, and clear legal regime describing the rights and obligations of States with respect to the sea. Permitting States to derogate from the provisions of the Convention because their claims pre-date its adoption is contrary to and would undermine this object and purpose. Just as a State that claimed sovereignty over a 200 nm territorial sea in the 1950s cannot lawfully maintain such a claim today, neither China nor any other State could sustain a claim to historic waters or historic rights in areas distant from its shores. The Convention does not permit such claims, and unless the Convention textually recognizes historic claims—such as Article 10 concerning "bays"—the Convention's provisions prevail over any such historic claims. The advent of the LOS Convention, both as treaty law and as reflecting customary international law, requires States to conform their maritime claims to its provisions.

Conclusion

China has not clarified its maritime claims associated with the dashed-line maps in a manner consistent with international law. China's laws, declarations, official acts, and official statements present conflicting evidence regarding the nature and scope of China's claims. The available evidence suggests at least three different interpretations that China might intend, including that the dashes are (1) lines within which China claims sovereignty over the islands, along with the maritime zones those islands would generate under the LOS Convention; (2) national boundary lines; or (3) the limits of so-called historic maritime claims of varying types.

As to the first interpretation, if the dashes on Chinese maps are intended to indicate only the islands over which China claims sovereignty then, to be consistent with the law of the sea, China's maritime claims within the dashed line would be those set forth in the LOS Convention, namely a territorial sea, contiguous zone, EEZ, and continental shelf, drawn in accordance with the LOS Convention from China's mainland coast and land features that meet the definition of an "island" under Article 121 of the Convention.74 Because sovereignty over South China Sea islands is disputed, the maritime zones associated with these islands would also be disputed. In addition, even if China possessed sovereignty of the islands, any maritime zones generated by those islands in accordance with Article 121 would be subject to maritime boundary delimitation with neighboring States.

As to the second interpretation, if the dashes on Chinese maps are intended to indicate national boundary lines, then those lines would not have a proper legal basis under the law of the sea. Under international law, maritime boundaries are created by agreement between neighboring States; one country may not unilaterally establish a maritime boundary with another country. Further, such a boundary would not be consistent with State practice and international jurisprudence, which have not accorded very small isolated islands like those in the South China Sea more weight in determining the position of a maritime boundary than opposing coastlines that are long and continuous.75 Moreover, dashes 2, 3, and 8 that appear on China's 2009 map are not only relatively close to the mainland shores of other States, but all or part of them are also beyond 200 nm from any Chinese-claimed land feature.

Finally, if the dashes on Chinese maps are intended to indicate the area in which China claims so-called "historic waters" or "historic rights" to waters that are exclusive to China, such claims are not within the narrow category of historic claims recognized in Articles 10 and 15 of the LOS Convention. The South China Sea is a large semi-enclosed sea in which numerous coastal States have entitlements to EEZ and continental shelf, consistent with the LOS Convention; the law of the sea does not permit those entitlements to be overridden by another State's maritime claims that are based on "history." To the contrary, a major purpose and accomplishment of the Convention is to bring clarity and uniformity to the maritime zones to which coastal States are entitled. In addition, even if the legal test for historic waters were applicable, the dashed-line claim would fail each element of that test.

* * * *

4. Archipelagic States

Throughout 2014, the U.S. Department of State published 16 studies of maritime claims by States as part of its *Limits in the Seas* series. These reports are issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State to provide the views of the United States Government regarding the consistency of such claims with international law. One of these 2014 studies, concerning China's claims in the South China Sea, is excerpted *supra*. The other 15 assess the maritime claims of the following states claiming to be "archipelagic States" under the Law of the Sea Convention: Antigua and Barbuda, the Bahamas, Cabo Verde, Comoros, the Dominican Republic, Grenada, Indonesia, Mauritius, Papua New Guinea, the Philippines, Seychelles, the Solomon Islands, Trinidad and Tobago, Tuvalu, and Vanuatu. The reports are available at www.state.gov/e/oes/ocns/opa/c16065.htm. Excerpts are reproduced *infra*, with footnotes omitted. The "Basis for Analysis" in each of the 15 studies essentially repeats the excerpts immediately following, which are from the Philippines study.

* * * *

Basis for Analysis

The LOS Convention contains certain provisions related to archipelagic States. Article 46 provides that an "archipelagic State" means "a State constituted wholly by one or more archipelagos and may include other islands" (Article 46.a). An "archipelago" is defined as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such" (Article 46.b).

Only an "archipelagic State" may draw archipelagic baselines. Article 47 sets out criteria to which an archipelagic State must adhere when establishing its archipelagic baselines (Annex 3 to this study).

Under Article 47.1, an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1. In addition, the length of any baseline segment shall not exceed 100 nm except that up to 3 percent of the total number of baselines may have a length up to 125 nm (Article 47.2).

Additional provisions of Article 47 state that such baselines shall not depart to any appreciable extent from the general configuration of the archipelago; that such baselines shall not be drawn, with noted exceptions, using low-tide elevations; and that the system of such baselines shall not be applied in such a manner as to cut off from the high seas or exclusive economic zone (EEZ) the territorial sea of another State (Article 47.3 - 47.5).

Article 48 provides that the breadth of the territorial sea, contiguous zone, EEZ and continental shelf shall be measured from archipelagic baselines drawn in accordance with Article 47. Article 49 provides that the waters enclosed by archipelagic baselines drawn in accordance with Article 47 are "archipelagic waters," over which the sovereignty of an archipelagic State extends, subject to the provisions in Part IV of the LOS Convention.

The LOS Convention further reflects the specific rights and duties given to archipelagic States over their land and water territory. Article 53 allows the archipelagic State to "designate sea lanes…suitable for the continuous and expeditious passage of foreign ships…through…its archipelagic waters and the adjacent territorial sea." Also, Article 53.12 provides that "[i]f an archipelagic State does not designate sea lanes… the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation."

* * * *

a. Antigua and Barbuda

Antigua and Barbuda's archipelagic baseline system set forth in Act No. 18 of August 17, 1982 appears to be consistent with Article 47 of the LOS Convention.

* * * *

Pursuant to the Act, Antigua and Barbuda has claimed the waters within certain named bays and harbors as internal. However, no geographic coordinates are provided and it does not appear as though the bay closing lines are depicted on publicly available charts of a scale adequate for ascertaining their position.

* * * *

As of March 2014, the government of Antigua and Barbuda had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, Section 15B(4) of the Act provides that where no sea lanes or air routes have been designated, "the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation."

Act No. 18 limits certain navigational rights within the maritime zones of Antigua and Barbuda. Most notably, in Section 14(2) of Act No. 18, Antigua and Barbuda claims that a foreign warship must receive permission from the Government of Antigua and Barbuda prior to navigating in its archipelagic waters and territorial sea. This provision is not permitted by the LOS Convention and is not recognized by the United States. In 1987, the United States delivered a diplomatic note protesting this restriction as inconsistent with international law, as reflected in the LOS Convention.

* * * *

b. The Bahamas

…The Bahamas' archipelagic baseline system set forth in the Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order, 2008, appears to be consistent with Article 47 of the LOS Convention.

* * * *

As of January 2014, The Bahamas had not designated sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, section 11.5 of The Bahamas Act No. 37 states that, "Where there is no designation made pursuant to [section 11.1] the right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation."

* * * *

Although the United States and The Bahamas do not have an agreed maritime boundary, the United States published its fishery enforcement line in a 1977 Federal Register notice, pursuant to the provisions of the Fishery Conservation and Management Act of 1976. This line, now the U.S. EEZ limit, was reiterated, and published, as a notice to the 1995 Federal Register. As of January 2014, the governments of The Bahamas and the United States were engaged in maritime boundary negotiations. One provision of Act No. 37 addresses the situation of undelimited boundaries. Specifically, concerning the EEZ, Section 8 of the Act states that "[w]here the median line … is less than two hundred miles from the nearest baseline, and no other line is for the time being specified . . ., the outer limits of the exclusive economic zone of The Bahamas extend to the median line."

* * * *

c. Cabo Verde

[W]ith the exception of the matter of the specifying the relevant geodetic datum, Cabo Verde's archipelagic baseline system set forth in Law No. 60/IV/92 appears to be consistent with Article 47 of the LOS Convention.

* * * *

As of January 2014, the Cabo Verde government had not formally designated any archipelagic sea lanes. Since no archipelagic sea lanes have been designated in accordance with the LOS Convention, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation" (Article 53.12).

* * * *

The declaration by Cabo Verde upon its signature of the LOS Convention in 1982 and reaffirmed upon ratification in 1987 states "In the exclusive economic zone, the enjoyment of the

freedoms of international communication, in conformity with its definition and with other relevant provisions of the LOS Convention, excludes any non-peaceful use without the consent of the coastal State, such as exercises with weapons or other activities which may affect the rights or interests of the said state ….” The United States has rejected this interpretation. The weapons/exercises declaration was not contained in the 1992 law.

* * * *

Article 13, pertaining to the EEZ, states that Cabo Verde “shall possess … (b) exclusive jurisdiction, with regard to (i) The establishment and use of artificial islands, installations and structures; (ii) Marine scientific research; (iii) The protection and preservation of the marine environment; and (iv) Any other rights not recognized to third States.” Subparagraphs (i), (ii), and (iii) of Article 13 mirror the permissible bases of jurisdiction set forth in Article 56 of the LOS Convention. However, whereas Cabo Verde claims “exclusive jurisdiction” with respect to these elements, the LOS Convention provides merely for “coastal State …jurisdiction as provided for in the relevant provisions of this Convention” (emphasis added). With respect to subparagraph (iv) referring to “any other rights not recognized to third States,” the LOS Convention does not provide for exclusive coastal state jurisdiction in this regard.

Article 14 of the law recognizes that high seas freedoms of navigation and overflight are available to all States within its EEZ. This is a partial recognition of the rights of other States in the EEZ. Article 58 of the LOS Convention states that, in addition to the freedoms of navigation and overflight, all States also enjoy, subject to the relevant provisions of the LOS Convention, “the freedoms …of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.”

* * * *

Article 21 of the law states that the “laying, maintenance or repair of submarine pipelines or cables by third States” in any of Cabo Verde’s maritime zones “may be carried out only with the prior authorization of the Republic of Cabo Verde.” Article 58.1 of the LOS Convention provides that, in the EEZ, the laying of submarine cables and pipelines is a high seas freedom that all States enjoy, subject to the relevant provisions of the LOS Convention.

* * * *

The law’s requirement for prior authorization with regard to the laying and maintenance of cables on Cabo Verde’s continental shelf is not found in the LOS Convention.

* * * *

Article 28 of the law provides, in part, that “…the location, exploration and recovery of any object of an archaeological and historical character, as well as treasures existing in the maritime areas of the Republic of Cape Verde …by any entity, whether national or foreign, shall require the express authorization of the competent national authorities.” Under Article 303.1 of

the LOS Convention, all nations share a duty to protect such objects and cooperate for this purpose. However, the LOS Convention limits a coastal State's jurisdiction over such objects to the seaward limit of the coastal State's 24-nm contiguous zone. Any enforcement of this provision against a foreign flagged vessel outside of the 24-nm contiguous zone would be inconsistent with the Convention, unless it is done with the consent of the flag State.

* * * *

d. Comoros

In conclusion, the archipelagic baseline system of Comoros does not appear to be consistent with the LOS Convention. Baseline point B on Banc Vailheu, a submerged feature, is not consistent with either Article 47.1 (specifying that the baselines join the outermost points of the outermost islands and drying reefs of the archipelago) or Article 47.3 (requiring that the baselines not depart from the general configuration of the archipelago).

Finally, as noted above, the sovereignty of Mayotte is disputed between Comoros and France. Mayotte is administered as a Department and region of France. Six of the 13 baseline points in Comoros' archipelagic baseline system are used to enclose Mayotte. France has protested this use of baseline points on Mayotte as "not compatible with the status of Mayotte and …without legal effect." In December 2013, by Decree No. 2013-1177, France promulgated baselines, including straight baselines and closing lines, from which the territorial sea of Mayotte is measured.

* * * *

e. The Dominican Republic

The Dominican Republic is located in the Caribbean Sea to the southeast of the Turks and Caicos Islands (U.K.), and to the west of Puerto Rico (U.S.) and to the east of Haiti on the island of Hispaniola. The Dominican Republic claims it is an archipelagic State, namely a State that is "constituted wholly by one or more archipelagos and [that] may include other islands" (LOS Convention, Article 46). The United States and some other countries have not accepted this claim.

* * * *

In conclusion, the archipelagic baseline system of the Dominican Republic does not appear to be consistent with the LOS Convention. Even assuming that the Dominican Republic qualifies as an archipelagic State under the LOS Convention, the archipelagic baseline system includes segments drawn from low-tide elevations that do not satisfy the conditions in Article 47.4 of the Convention. Further, the water-to-land area ratio set forth in Article 47.1 has been met only by utilizing such low-tide elevations.

* * * *

Article 14 of Law No. 66-07 defines the outer limit of the Dominican Republic's EEZ claim. … Portions of the claimed EEZ impinge on the claimed maritime limits of the United Kingdom (Turks and Caicos Islands), The Netherlands (Aruba and Curaçao), Haiti, and the United States (Puerto Rico). The Dominican Republic's claimed EEZ also disregards the Dominican Republic's maritime boundary with Venezuela….

* * * *

Article 53 of the LOS Convention provides that all ships and aircraft enjoy the right of archipelagic sea lanes passage, either through designated sea lanes and air routes or, where no such designations have been made, through the routes normally used for international navigation. Law No. 66-07 does not mention this right.

Articles 5 and 11 of Law No. 66-07 recognize the right of "innocent passage through [the Dominican Republic's] archipelagic waters and superjacent airspace." These articles also provide that this is "without prejudice to right of the Dominican State to designate passage routes …." Although this provision does not comport with the Convention, it may be an attempt by the Dominican Republic to refer to archipelagic sea lanes passage (which unlike "innocent passage" includes overflight) and the designation of "sea lanes" that traverse archipelagic waters (LOS Convention, Article 53). … As of January 2014, the Dominican Republic had not designated sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Since no archipelagic sea lanes have been designated in accordance with the LOS Convention, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation" (Article 53.12).

Article 12 of Law No. 66-07 states that "ships and aircraft containing cargoes of radioactive substances or highly toxic chemicals" navigating through the archipelagic waters and territorial sea or its superjacent airspace shall not be considered innocent. This provision is inconsistent with the LOS Convention. Articles 17 and 52 of the LOS Convention state that "ships of all States … enjoy the right of innocent passage through …" the territorial sea and archipelagic waters, respectively. Article 23 of the LOS Convention states in part that "… ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements." This obligation applies to the flag State; the LOS Convention does not permit a coastal State to render passage non-innocent due to carriage of hazardous cargo.

* * * *

Article 6 of Law No. 66-07 claims certain bodies of waters as internal waters. Most of these claims were previously made in the Law No. 186, of September 13, 1967. The Dominican Republic's law refers to the headlands of the claimed juridical bays, but does not provide any geographic coordinates or show the bay closing lines on any charts. Article 16 of the LOS Convention states that "the baselines for measuring the breadth of the territorial sea determined in accordance with articles …9 [mouths of rivers] and 10 [bays]…shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical coordinates of points, specifying the geodetic datum, may be substituted." Further, Article 16

provides that the coastal State shall deposit a copy of each such chart or list with the Secretary-General of the United Nations. It does not appear that the Dominican Republic has deposited with the Secretary General such a chart or list, or otherwise given due publicity to the charts or lists of geographic coordinates that would be needed to support the claims contained in Article 6 of Law No. 66-07. Article 7 of Law No. 66-07 provides "[t]he following shall be considered historic bays: Santo Domingo, the area enclosed between Cabo Palenque and Punta Caucedo, and the Escocesa, the area between Cabo Francés Viejo and Cabo Cabrón. The waters that enclose them shall be considered internal waters." Santo Domingo and Escocesa Bays are not recognized by the United States as historic bays.

* * * *

Article 15 of Law No. 66-07 states that "[t]he Dominican Republic shall exercise jurisdiction over the exclusive economic zone as provided for in the 1982 United Nations Convention on the Law of the Sea . . ." The Additional Paragraph following Article 16 refers in part to "salvage operations with respect to treasures from ancient sunken vessels within the exclusive economic zone which constitute part of the national cultural heritage." Under Article 303.1 of the LOS Convention, all nations share a duty to protect such objects and cooperate for this purpose. Article 303.3 provides that "[n]othing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges." To the extent that the Dominican Republic is relying on coastal State jurisdiction to implement this provision, Article 303.2 limits coastal State jurisdiction over such objects to the seaward limit of the coastal State's 24-nm contiguous zone.

* * * *

f. Grenada

…Grenada's archipelagic baseline system set forth pursuant to Act No. 25 of 1989 appears to be consistent with Article 47 of the LOS Convention.

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Pursuant to Act No. 25, the Grenada Territorial Sea and Maritime Boundaries (Closing Lines—Internal Waters) Order of 1992 sets forth coordinates for closing lines defining the internal waters of Grenada. … The closing lines pertain to 28 named and unnamed bays and harbors. The coordinates set forth in Grenada's 1992 order properly enclose these bays, in accordance with Article 10 of the LOS Convention….

* * * *

As of March 2014, the government of Grenada had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, Section 19(5) of the Act provides that where no sea lanes or air routes have been designated, "the right of

archipelagic sea lanes passage may be exercised through or over the routes normally used for international navigation or overflight."

* * * *

Section 11 and 13 of the Act pertain to the continental shelf and EEZ, respectively, and provide for sovereign rights and jurisdiction similar to what is provided for in Parts V (Exclusive Economic Zone) and VI (Continental Shelf) of the LOS Convention. However, whereas Grenada claims "exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution," the LOS Convention provides merely for "coastal State …jurisdiction as provided for in the relevant provisions of this Convention" (emphasis added). Part XII of the Convention pertains to Protection and Preservation of the Marine Environment.

* * * *

Section 14 of the Act pertains to the laying or maintenance of submarine cables or pipelines on Grenada's continental shelf. Section 14(3) of the Act provides that the course for the laying of submarine cables on Grenada's continental shelf is subject to the consent of the Minister. Article 79(3) of the LOS Convention, however, limits the coastal State's authority in this regard to the course for the laying of pipelines only.

* * * *

g. Indonesia

Indonesia's archipelagic baseline system set forth in Regulation No. 37 of 2008 appears to be generally consistent with Article 47 of the LOS Convention. However, it appears as though Indonesia needs to address with Timor-Leste the effect that its archipelagic baselines have on Timor-Leste's maritime claims. Indonesia has proposed and the IMO has adopted three archipelagic sea lanes, which the government of Indonesia later formally designated in its Regulation No. 37 of 2002. This is a partial designation of archipelagic sea lanes; accordingly, the right of archipelagic sea lanes passage may be exercised within the three designated routes, and also within other routes normally used for international navigation. The Indonesian government has, on occasion, attempted to restrict the exercise of this right by U.S. military aircraft, attempts which are inconsistent with the navigational rights reflected in the LOS Convention.

* * * *

h. Mauritius

Both of Mauritius' archipelagic baseline systems set forth in the Maritime Zones (Baselines and Delineating Lines) Regulations 2005 appear to be consistent with Article 47 of the LOS Convention. However, because Mauritius' archipelagic baseline system for the Chagos Archipelago includes the islands of the British Indian Ocean Territory, the United States does not recognize this archipelagic baseline system. Mauritius' legislation does not recognize the right of archipelagic sea lanes passage, and Mauritius' requirement that ships carrying radioactive materials obtain authorization from the government of Mauritius prior to exercising the right of innocent passage or archipelagic sea lanes passage is not consistent with the LOS Convention. Mauritius' use of straight baselines for the island of Mauritius does not conform to the requirements of Article 7 of the LOS Convention. Mauritius' treatment of reefs, bays, and mouths of rivers generally conform to the Convention's requirements, with the exception of Mathurin Bay, which is not a juridical bay (Article 10 of the LOS Convention) and does not appear to meet the criteria for an historic bay.

* * * *

i. Papua New Guinea

The archipelagic baseline system for Papua New Guinea's Principal Archipelago does not meet the requirements of the LOS Convention. The baseline system does not join the outermost points of all the outermost islands of the archipelago (Article 47.1), and one baseline segment exceeds the maximum permissible length of 125 nm (Article 47.2). The government of Papua New Guinea has stated that it is preparing maritime zones legislation that will align all the maritime zones of Papua New Guinea with the relevant provisions of the LOS Convention.

* * * *

j. The Philippines

This study analyzes the maritime claims and maritime boundaries of the Republic of the Philippines, including its archipelagic baseline claim.

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The Philippines' archipelagic baseline system appears to be consistent with Article 47 of the LOS Convention. The legislation establishing the baselines, however, did not clarify whether the waters within the baselines are internal waters or archipelagic waters, nor did it specify the breadth of the territorial sea of the Philippines. In upholding the Philippine legislation that established its archipelagic baselines, the Philippine Supreme Court has recognized that Philippine sovereignty over the waters within the baselines is subject to the rights of innocent passage and archipelagic sea lanes passage, as provided for under international law. It appears

that the Government of the Philippines intends to enact additional legislation that will further clarify its maritime zones in a manner consistent with the LOS Convention.

* * * *

k. Seychelles

Because of its geography, Seychelles' Baselines Order establishes archipelagic baselines around four separate groups of islands.

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In summary, Group 1 does not appear to meet the water-to-land area ratio set forth in Article 47.1; because it is not enclosed or nearly enclosed by islands and drying reefs lying on the perimeter of Seychelles Bank, it cannot benefit from the use of Article 47.7. Further, all four Groups appear to contain baseline points in open water and thus do not conform to Article 47.4.

* * * *

Part III (sections 9-14) of Act No. 2, pertaining to the EEZ and continental shelf, contains a number of provisions that mirror those contained in the LOS Convention regarding coastal State jurisdiction. However, sections 10(d)-(e) and 12(b) provide that Seychelles has, in its EEZ and on its continental shelf "Exclusive jurisdiction over artificial islands, installations and structures... [and] [e]xclusive jurisdiction to regulate, authorize and control marine scientific research." Whereas Seychelles claims "exclusive jurisdiction" over these matters, Article 56 of the LOS Convention provides merely for "coastal State …jurisdiction as provided for in the relevant provisions of this Convention" (emphasis added).

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As of February 2014, Seychelles' government had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO. Consistent with Article 53.12 of the LOS Convention, section 18(5) of Act No. 2 states that "[w]here no sea lanes or air routes through or over archipelagic waters have been designated under section 19, the right of archipelagic sea lanes passage may be exercised through lanes or routes normally used for international navigation."

Act No. 2 limits certain navigational rights within the maritime zones of Seychelles. Sections 16(2) and (4) require foreign warships, nuclear-powered ships and ships carrying any nuclear substance or radioactive substance or materials to give notice to and obtain the prior authorization from the government of Seychelles before transiting the territorial sea or archipelagic waters. Section 17(3) further states that "passage of a foreign warship in the territorial sea or archipelagic waters is prejudicial to the peace, good order or security of Seychelles …without the prior notice and authorizations." Under Article 17 of the LOS Convention, "ships of all States, whether coastal or land-locked, enjoy the right of innocent

passage through the territorial sea." This right of innocent passage also applies in archipelagic waters (Article 52). Sections 16 and 17 of Act No. 2 impermissibly restrict the right of innocent passage and are not in conformity with the LOS Convention. In 2000, the United States delivered a diplomatic note protesting these, as well certain other, sections of Seychelles' legislation. The United States continues to not recognize such navigational restrictions that are not in conformity with international law, as reflected in the LOS Convention.

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l. The Solomon Islands

Four of the five archipelagic baseline systems of Solomon Islands meet the water-to-land area ratio set forth in Article 47.1: ….[W]ith the exception of Group 3, Solomon Islands' archipelagic baseline system set forth in the 1979 Declaration appears to be consistent with Article 47 of the LOS Convention.

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As of March 2014, the government of Solomon Islands had not formally designated any archipelagic sea lanes or prescribed traffic separation schemes, nor had it presented proposals to this effect to the IMO [International Maritime Organization]. Consistent with Article 53.12 of the LOS Convention, Section 10(4) of the Act provides: "Until such time as sealanes or air routes are designated …the [right of archipelagic sea lanes passage described in Section 10] may be exercised through and over all routes normally use for international navigation and overflight."

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m. Trinidad and Tobago

Trinidad and Tobago's archipelagic baseline system set forth in Act No. 24 of November 11, 1986 appears to be consistent with Article 47 of the LOS Convention.

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As of January 2014, the Trinidad and Tobago government had not formally designated any archipelagic sea lanes. Since no archipelagic sea lanes have been designated in accordance with the LOS Convention, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation" (Article 53.12).

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n. Tuvalu

Tuvalu's archipelagic baseline system enclosing three of its islands appears to be consistent with the LOS Convention (Article 47), as does Tuvalu's approach to using the normal baseline for six of its islands (Articles 5 and 6). The provisions of Tuvalu's legislation pertaining to its maritime zones, including the navigation provisions, likewise appear to be consistent with international law as reflected in the LOS Convention.

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o. Vanuatu

...Vanuatu's archipelagic baseline system set forth in Order No. 81 of 2009 appears to be consistent with Article 47 of the LOS Convention.

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Section 5 of Act No. 6 recognizes the right of innocent passage of foreign ships through the archipelagic waters and territorial sea of Vanuatu. However, paragraph 10 of Section 5 provides that, for certain vessels such as foreign warships, the right of innocent passage is "subject to the prior written approval of the Minister [responsible for the Maritime Zones]." This provision is not permitted by the LOS Convention and is not recognized by the United States.

Vanuatu's law does not mention the right of archipelagic sea lanes passage for all ships and aircraft, which is provided for in Article 53 of the LOS Convention. As of March 2014, the Vanuatu government had not formally designated any archipelagic sea lanes. In accordance with Article 53.12 of the LOS Convention, since Vanuatu has not designated archipelagic sea lanes, the "right of archipelagic sea lane passage may be exercised through the routes normally used for international navigation."

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Section 10(2) of the Act provides in part that "Vanuatu has jurisdiction and control in the exclusive economic zone, in respect of …the authorization, regulation and control of …the recovery of archaeological or historical objects." Under Article 303.1 of the LOS Convention, all nations share a duty to protect such objects and cooperate for this purpose. However, the LOS Convention limits a coastal State's jurisdiction over such objects to the seaward limit of the coastal State's 24-nm contiguous zone. Any enforcement of this provision of Vanuatu's law with respect to objects outside of the 24-nm contiguous zone against a foreign flagged vessel would be inconsistent with the LOS Convention, unless it is done with the consent of the flag State.

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5. Piracy

See Chapter 3.B.6.

6. Freedoms of Navigation and Overflight

a. Nicaragua

On March 7, 2014, the Embassy of the United States of America in Nicaragua delivered a diplomatic note to the Ministry of Foreign Affairs of the Republic of Nicaragua regarding Nicaragua's excessive straight baseline and exclusive economic zone ("EEZ") claims. The claims were made in the August 19, 2013 Decree No. 33-2013 issued by Nicaraguan President Ortega concerning "Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea." Excerpts from the U.S. diplomatic note delivered on March 7, 2014 appear below.

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The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Republic of Nicaragua and has the honor to refer to Decree No. 33-2013 concerning Baselines of the Marine Areas of the Republic of Nicaragua in the Caribbean Sea issued by the President of Nicaragua on August 19, 2013.

The United States recalls that, as recognized in customary international law and as reflected in Part II of the 1982 United Nations Convention on the Law of the Sea (LOS Convention), unless exceptional circumstances exist, baselines are to conform to the low-water line along the coast as marked on a State's official large-scale charts. As reflected in Article 7 of the LOS Convention, straight baselines may only be employed in localities where the coastline is deeply indented and cut into, or where there is a fringe of islands along the immediate vicinity of the coast. Additionally, baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

The Government of the United States notes that Decree No. 33-2013 lists nine baseline points that connect to create a straight baseline system extending the entire length of Nicaragua's approximately 500 kilometer-long coast facing the Caribbean Sea. The United States observes further that the coastline of Nicaragua is smooth and not indented, with only a few exceptions. Furthermore, although the Corn Islands and other islands lie off the mainland coast of Nicaragua, these islands do not constitute "a fringe of islands along the immediate vicinity of the coast." Rather, some of the islands that are used as baseline points in Nicaragua's straight baseline system are individual islands that are not close to other islands and are a significant distance from the coast. Edinburgh Cay and the Little and Great Corn Islands, for instance, are all more than 25 nautical miles from the closest point on Nicaragua's mainland coast. Additionally, some of the straight baseline segments are exceptionally long; for instance, the segments between

baseline points 4 and 5 and between baseline points 8 and 9 are 72 and 83 nautical miles, respectively. Finally, many of the baseline segments depart from the general direction of the coast. Taken in its entirety, Nicaragua's system of straight baselines purports to enclose significant areas of territorial sea and exclusive economic zone (EEZ) as internal waters. In the view of the United States, such waters are not sufficiently closely linked to the land domain to be subject to the regime of internal waters.

Accordingly, with regard to the Decree and baselines set forth therein, the United States is obliged to reserve its rights and those of its nationals. These baselines, as asserted, impinge on the rights, freedoms, and uses of the sea by all nations by expanding the seaward limit of maritime zones and enclosing as internal waters areas that were previously territorial sea and EEZ.

The United States requests that the Government of Nicaragua review its current practice on baselines and make appropriate modifications to its baselines to bring them into conformity with international law, as reflected in the LOS Convention. The United States would be pleased to discuss further this and other related issues with Nicaragua.

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The Ministry of Foreign Affairs of Nicaragua delivered a diplomatic note to the U.S. Embassy on February 27, 2014 regarding the U.S. vessel USNS Pathfinder, which Nicaragua claimed had been seen "in Nicaraguan waters" without permission of the competent authorities of Nicaragua. The United States Embassy was directed to address the Pathfinder issue in addition to the excessive baseline claims in its discussions with the Ministry of Foreign Affairs. U.S. Embassy officials explained that the Pathfinder was well outside of Nicaragua's territorial sea and that its activities were consistent with international law. The U.S. points included the explanation that the EEZ is a zone of limited coastal State jurisdiction that is legally distinct from territorial sea.

On March 7, 2014, the U.S. Embassy related that a Ministry of Foreign Affairs official acknowledged that the Pathfinder was in EEZ waters, and not territorial waters and that prior coastal state permission was not required. The Ministry also agreed to carefully review the U.S. objection to the Presidential degree regarding baselines, as detailed in the diplomatic note delivered March 7, 2014.[*]

b. Cuba

On June 12, 2014, the Department of State, through the Cuban Interests Section of the Embassy of Switzerland, responded to diplomatic notes from the Government of Cuba alleging U.S. violations of Cuban airspace in February and March of 2014. The U.S. response included the following:

[*] Editor's note: In September 2014, Nicaragua's Ministry of Foreign Affairs sent the United States an additional diplomatic note challenging U.S. surveys. The U.S. response to that note was delivered in January 2015 and will be discussed in *Digest 2015*.

On February 11, 2014, while on patrol in the Florida Straits, a United States Coast Guard (USCG) aircraft located two small vessels transiting near the Cuban territorial sea. As the Government of Cuba is aware, many of the small vessels that attempt to navigate the area where these vessels were located are of poor material condition and of interest to the USCG due to the risk they pose to safety of life at sea. When investigating both vessels, the closest the USCG aircraft came to the Cuban coast was 13 nautical miles. The USCG aircraft never entered within the internationally recognized sovereign airspace of Cuba. The USCG aircraft was eventually able to contact a Cuban patrol boat that arrived and rendered assistance to one of the vessels in question. The second vessel remained more than 15 nautical miles off Cuba's shore.

On March 27, 2014, the USCG conducted a search and rescue operation in the vicinity of Cay Lobos, Bahamas, after a "Good Samaritan" vessel reported a number of people stranded on the small island. The Government of the Bahamas granted the USCG permission to overfly the island for the purpose of dropping critical supplies to the survivors, who had been without food or water for several days. Other than operations to overfly the Bahamian island of Cay Lobos, USCG aircraft rescue operations were limited to international airspace and all operations were consistent with international conventions on maritime and aeronautical search and rescue, and with other internationally recognized uses of that airspace. The survivors were subsequently removed form Cay Lobos, Bahamas, by a USCG helicopter and transferred to Bahamian authorities for final disposition.

c. Peru

On November 12, 2014, the United States responded to a diplomatic note from the Peruvian Ministry of Foreign Affairs regarding a flight of U.S. Air Force C-17 aircraft Reach 282. Peruvian authorities asserted that the flight required clearance from Peru to enter its airspace. Excerpts follow from the U.S. reply note.

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[O]n August 7th, U.S. military aircraft Reach 282, following a flight plan from Panama to Chile, was flying in international airspace on a route of flight that at all times was outside Peruvian national airspace. During transit through the Lima Flight Information Region (FIR) this flight enjoyed freedom of navigation applicable to all nations provided for under international law.

International law permits a state to claim a territorial sea and corresponding national airspace up to twelve nautical miles in breadth, as measured from the state's base lines drawn in accordance with international law. Beyond this limit, all aircraft, including military or other state

aircraft, enjoy the freedoms of navigation and overflight and are not subject to the jurisdiction or control of air traffic control authorities of coastal states, as long as they do not intend to enter such national airspace. No notice to, clearance from, or approval of a coastal state is required to exercise such freedoms of navigation and overflight. The United States affirms its navigation and overflight rights in international airspace beyond twelve nautical miles from baselines drawn consistent with international law.

After reviewing the flight path of Reach 282, we have determined the aircraft was more than 12 nautical miles from the territory of Peru, and therefore outside Peruvian airspace at all times during its flight. The aircraft was operating in international airspace with due regard for the safety of civil aircraft. Military aircraft lawfully operating in international airspace with due regard for the safety of civil aircraft are under no obligation to check in with or obtain clearance from civil air traffic controllers. Regular overflights in the Lima FIR by U.S. military aircraft can be expected to continue.

The United States Government requests the Government of Peru to review this matter and ensure that the freedoms of navigation and overflight enjoyed by all nations under international law are not infringed in the future. The United States is willing to send experts from Washington to further explain its position if that would be helpful to your government.

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d. Maldives

In October 2014, the United States replied to a diplomatic note dated September 4, 2014 from the Ministry of Foreign Affairs of the Republic of Maldives expressing concern about reports of unauthorized aircraft operating in what Maldivian officials considered to be Maldivian airspace. The U.S. reply note affirmed that the aircraft were operating in international airspace.

7. Maritime Security and Law Enforcement

a. Agreement with Micronesia

On March 3, 2014, the Government of the United States of America and the Government of the Federated States of Micronesia signed an "Agreement concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity." The agreement entered into force upon signature and superseded the agreement between the two governments "to support ongoing regional maritime security efforts," that entered into force May 14, 2008. TIAS 08-514. See *Digest 2008* at 649-50 for discussion of the original agreement with Micronesia. The 2014 agreement is available at

www.state.gov/documents/organization/225158.pdf.

b. Agreement with Ghana

The temporary United States-Ghana maritime law enforcement agreement (concluded via an exchange of notes) entered into force on March 25, 2014 and U.S. Coast Guard and Navy maritime law enforcement operations commenced with Ghana in 2014.

c. Agreement with Honduras

After several years of negotiation, the United States-Honduras revised maritime law enforcement agreement was signed on March 26, 2014.

d. Agreement with Cabo Verde

A maritime security and law enforcement agreement between the United States and Cabo Verde was signed on March 24, 2014.

B. OUTER SPACE

1. UN Group of Governmental Experts

As discussed in *Digest 2013* at 377-78, the UN Group of Governmental Experts ("GGE") on transparency and confidence-building measures ("TCBMs") for outer space activities reached consensus in July 2013. The United States continued to support the work of the GGE in 2014. On February 27, 2014, Frank A. Rose, Deputy Assistant Secretary of State for the Bureau of Arms Control, Verification and Compliance, addressed the 3rd International Symposium on Sustainable Space Development and Utilization for Humankind in Tokyo, Japan. His remarks regarding the GGE and its work on the TCBMs for outer space are excerpted below. His remarks are available in full at www.state.gov/t/avc/rls/2014/222791.htm.

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As many of you know, the UN Group of Governmental Experts, or GGE, was established by the UN General Assembly to study the possible contributions of voluntary, non-legally binding TCBMs to strengthen stability and security in outer space. The Group included experts nominated by fifteen UN Member States, though we all served in our personal capacities.

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Furthermore, the Group endorsed efforts to pursue political commitments—including a multilateral code of conduct—to encourage responsible actions in, and the peaceful use of, outer space. In this regard, the Group noted the efforts of the European Union to develop an International Code of Conduct for Outer Space Activities through open-ended consultations with the international community.

Finally, the Group's study endorsed efforts to pursue bilateral transparency and confidence-building measures. This highlights the importance of efforts such as ongoing discussions on space security policy that the United States has been conducting with a number of spacefaring nations, including Russia, Italy, South Africa, and Japan. These discussions, along with U.S. efforts to develop mechanisms for improved warning of potential hazards to spaceflight safety, constitute significant measures to clarify intent and build confidence.

The GGE's endorsement of voluntary, non-legally binding transparency and confidence building measures to strengthen stability in space is an important development, and the consensus report was endorsed by UN General Assembly resolution last December.

I would like to close by noting that while all nations are increasingly reliant on space, our ability to continue to utilize space for these benefits is at serious risk. Accidents or irresponsible acts against space systems would not only harm the space environment, but would also disrupt services on which all governments and people depend. As a result, I would recommend that all governments review and consider implementing the recommendations of the GGE.

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2. UN Committee on the Peaceful Uses of Outer Space

Brian Israel, U.S. Representative to the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space ("COPOUS"), delivered a statement on non-legally binding UN instruments on outer space in April 2014. Mr. Israel's remarks are excerpted below and available at *www.state.gov/s/l/c8183.htm*.

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Among the most important roles for international lawyers in facilitating successful international cooperation is identifying the optimal cooperative mechanism in any given case—including when a legally non-binding mechanism may actually facilitate the cooperative objectives better than a treaty. The *Principles Relating to Remote Sensing of the Earth from Outer Space* serve as an excellent example of this Subcommittee advancing groundbreaking uses of outer space for the benefit of all countries through such a legally non-binding mechanism.

With the advent of remote sensing came a need to reconcile the great promise of this new capability with the concerns shared by many States about having access to data about their

territory. Harnessing the full potential of remote sensing thus required a global consensus on how it was to be conducted.

As delegates are aware, this Subcommittee ultimately elected to develop a set of principles on remote sensing, which were adopted unanimously by the General Assembly. This mechanism offered the benefit of a *global* consensus on how this new activity would be conducted, rather than the piecemeal acceptance over time that generally attends international agreements.

The legally non-binding character of the Remote Sensing Principles certainly has not deprived them of influence—to the contrary, they are widely credited with fostering a successful international regime and enabling the robust remote sensing capabilities we enjoy today, whose myriad applications, such as in disaster mitigation and response, benefit all States.

At the heart of the Remote Sensing Principles is the principle of non-discriminatory access set forth in Principle XII. This principle of non-discriminatory access has been integrated into U.S. law, mandating that licenses to operate private remote sensing systems obligate the operator to "make available to the government of any country…unenhanced data collected by the system concerning the territory under the jurisdiction of such government as soon as such data are available and on reasonable terms and conditions."[1] It is worth noting that the United States did not incorporate this principle into law because it was legally required to do so—the Principles, after all, are not legally binding—but rather in furtherance of its investment in the success of the international regime for remote sensing the Principles embody.

Mr. Chairman, I will conclude with the reflection that the nature of the task faced by this Subcommittee as it took up the subject of remote sensing in the mid-1970s differed fundamentally from the task it faced in the mid-1960s. In contrast to the task of developing an international legal framework for outer space where none existed, this Subcommittee undertook its work on remote sensing with a functioning international legal framework already in place.

The same could be said of the efforts of space agencies, about a decade later, beginning at UNISPACE III, to cooperate to realize the potential of remote sensing systems for disaster management. These agencies were able to build upon not only the international legal framework that enables the use of outer space, but also the international regime enabled by the Remote Sensing Principles, and were thus able to structure their highly successful cooperation on disaster management around an even less formal cooperative mechanism—the International Charter on Space and Major Disasters.

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On October 17, 2014, Kenneth Hodgkins, Head of the U.S. delegation, delivered remarks on international cooperation in the peaceful uses of outer space at a session of COPOUS. Mr. Hodgkins' remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/233595.htm*.

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[1] 51 U.S.C. § 60122(b)(2).

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… the U.S. was pleased to join Russia and China in co-sponsoring General Assembly resolution 68/50 on transparency and confidence building measures in outer space. It specifically highlights the contributions of COPUOS to the development and implementation of TCBMs that increase the security, safety and sustainability of outer space. The resolution also refers the report of a Group of Governmental Experts on space TCBMs, A/68/189, to COPUOS and several other UN bodies for further consideration. In the view of my delegation, the GGE report contains a wealth of valuable information and highly relevant recommendations on what states and the UN can do to ensure the safe and sustainable use of outer space. At this time, we would like to highlight several parts of the report.

The GGE report's discussion of "Coordination" suggests that a UN inter-agency mechanism could provide a useful platform for the promotion and effective implementation of TCBMs for space activities. It is also worth noting that the Secretary-General of the UN has stated his support for the Group's recommendation to establish coordination between various entities of the United Nations and other institutions involved in space activities. In this regard, the interagency meeting on space, known as UN Space, which is organized by OOSA, could fill this role.

Additionally, we note that the GGE recommends that as specific unilateral, bilateral, regional and multilateral TCBMs are agreed to, States should regularly review the implementation of such measures and discuss additional ones that may be necessary. Again, there could be a role for COPUOS in this regard.

Finally, in the report's discussion of "Information exchange and notifications related to space activities" and "risk reduction notifications," the Experts suggested measures that are directly relevant to the work we are doing on the long-term sustainability of space activities. We welcome COPUOS inviting member states to "submit their views on the modalities of making practical use of the recommendations contained in the report of the GGE as they related to and/or could prove instrumental in ensuring the safety of space operations. The results of this work in COPUOUS should be submitted to the General Assembly and discussed in a joint ad hoc meeting of the First and Fourth Committees during the 70th session of the General Assembly in 2015. And in this regard, my delegation strongly recommends that there be close coordination for this joint ad hoc meeting among the Secretariats of the First and Fourth Committee as well as with the Office of Outer Space Affairs.

We would like to note the progress made by the Scientific and Technical Subcommittee and its Working Group on the Long-Term Sustainability of Space Activities, under the Chairmanship of Peter Martinez of South Africa. We commend Mr. Martinez for his diligent efforts during the meeting of the Working Group and his efforts in between sessions, and we look forward to continuing to work with him. The U.S. believes that this topic is very timely due to the increasing number of space actors, spacecraft, and space debris. It is essential that we come together to agree on measures that can be employed to reduce the risks to space operations for all.

As we have in the past, we again take this opportunity to note that COPUOS and its Legal Subcommittee have a distinguished history of working through consensus to develop space law in a manner that promotes space exploration. The Legal Subcommittee played a key role in

establishing the primary Outer Space Treaties – the Outer Space Treaty of 1967, the Rescue and Return of Astronauts Agreement, and the Liability and Registration Conventions. Under the legal framework of these treaties, space exploration by nations, international organizations and, now, private entities has flourished. As a result, space technology and services contribute to economic growth and improvements in the quality of life around the world.

At the last session of the Legal Subcommittee, work continued on the multi-year work plan entitled "Review of the international mechanisms for cooperation in the peaceful exploration and use of outer space." The United States is particularly pleased that the Subcommittee established a working group under the leadership of Professor Aoki of Japan. In accordance with the work plan, the Subcommittee conducted an exchange of information on the range of existing international space cooperation mechanisms. In the upcoming sessions, the Committee will continue to take stock of international cooperative mechanisms employed by Member States with a view to developing an understanding of the range of collaborative mechanisms employed by States. This information will be helpful to Member States as they consider relevant mechanisms to facilitate future cooperative endeavors in the peaceful uses of outer space. And in this regard, this item is particularly timely in that 2017, the final year of consideration of this agenda item, coincides with the fiftieth anniversary of the Outer Space Treaty.

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3. UN General Assembly First Committee Discussion on Outer Space

On October 27, 2014, Christopher L. Buck, Alternate Representative for the U.S. delegation, delivered remarks at the 69th UN General Assembly First Committee thematic discussion on outer space. Mr. Buck's remarks are excerpted below and available at *www.state.gov/t/avc/rls/2014/233445.htm*.

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… Outer space is becoming increasingly congested from orbital debris and contested from human threats that endanger the space environment. Therefore, it is essential that all nations work together to preserve this domain for use by future generations.

In this context, the United States is especially concerned about the continued development, testing, and, ultimately, deployment of destructive anti-satellite (ASAT) systems. Although some States have advocated for space arms control measures to prohibit the placement of weapons in outer space, their own development and testing of destructive ASAT capabilities is de-stabilizing, could trigger dangerous misinterpretations and miscalculations, and could be escalatory in a crisis or conflict.

ASAT weapons directly threaten satellites and the information that those satellites provide. They pose a direct threat to key infrastructure used in arms control verification monitoring; military command, control, and communications; and strategic and tactical warning of attack. Furthermore, a debris-generating ASAT test or attack may only be minutes in duration,

but the consequences could last for decades and indiscriminately threaten space assets used by all nations. The United States believes that testing debris-generating ASAT systems threatens the national security, economic well-being, and civil endeavors of all nations.

In considering options for international cooperation to ensure space security and sustainability, we acknowledge that some States have proposed a new, legally binding agreement that would prohibit the placement of weapons in outer space. For its part, the United States is willing to consider space arms control proposals and concepts that are equitable, effectively verifiable, and enhance the security of all nations. However, the revised draft "Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects"—also known as the "PPWT"—submitted by Russia and China to the Conference on Disarmament (CD) earlier this year, does not satisfy these criteria.
As the United States has noted in our analysis submitted to the CD, which was published as CD/1998 dated September 3, 2014, the 2014 draft PPWT, like the earlier 2008 version, remains flawed. Above all, there is no integral verification regime to help monitor compliance with the ban on the placement of weapons in outer space. Moreover, Russia and China openly acknowledge that technologies do not currently exist to verify compliance with such a ban.

Furthermore, the updated draft PPWT distracts attention from terrestrially-based ASAT systems. Under the PPWT, there is no prohibition on the research, development, testing, production, storage or deployment of terrestrially-based anti-satellite weapons. Thus, the PPWT evades the fact that terrestrially based capabilities could be used to perform the same functions as space-based weapons. For example, according to our analysis, China's January 11, 2007, flight-test of a ground-based direct-ascent ASAT missile against its own weather satellite would have been permitted under both the 2008 as well as the updated 2014 draft PPWT. China's subsequent, non-destructive test of this same ASAT system on July 23, 2014, also would have been allowed.

In contrast to the flawed approach offered by the PPWT, there are numerous pragmatic ways where spacefaring nations could cooperate to preserve the security and sustainability of the space domain. Indeed, the United States is convinced that there are challenges that can, and should, be addressed through practical, near-term initiatives, such as non-legally binding transparency and confidence-building measures (TCBMs) to encourage responsible actions in, and the peaceful use of, outer space. Such pragmatic, non-legally binding measures either are already being implemented unilaterally, bilaterally, or multilaterally, or could be developed and implemented by spacefaring nations in the future.

In this regard, the United States fully participated in, and endorsed, the consensus study of outer space TCBMs by the UN Group of Governmental Experts (GGE), whose report was later endorsed on December 5, 2013, by the full General Assembly in Resolution 68/50. Moreover, the United States is co-sponsoring a follow-on resolution at this session on "Transparency and Confidence-Building Measures for Outer Space Activities," which supports further consideration of the GGE's recommendations at a joint ad hoc meeting of the First and Fourth Committees next year during the General Assembly's seventieth session.

The GGE report endorsed voluntary, non-legally binding transparency and confidence-building measures to strengthen stability in space. It also endorsed efforts to pursue political commitments—including a multilateral code of conduct—to encourage responsible actions in, and the peaceful use of, outer space.

The United States also welcomes proposals for the development of additional TCBMs if they satisfy the criteria established in the consensus report. Per the GGE consensus report, non-legally binding TCBMs for outer space activities should:

1) be clear, practical, and proven, meaning that both the application and the efficacy of the proposed measure must be demonstrated by one or more actors;
2) be able to be effectively confirmed by other parties in their application, either independently or collectively; and finally,
3) reduce or even eliminate the causes of mistrust, misunderstanding, and miscalculation with regard to the activities and intentions of States.

In this regard, we would note that some ideas for TCBMs that have been mentioned in the First Committee fail to meet the GGE's criteria for a valid TCBM. For example, in assessing the Russian initiative for States to make declarations of "No First Placement" (NFP) of weapons in outer space, we conclude that the NFP initiative has three basic flaws:

First, the NFP Pledge does not adequately define what constitutes a "weapon in outer space."

Second, other parties would not be able to confirm effectively a State's political commitment "not to be the first to place weapons in outer space."

Third, the NFP Pledge focuses exclusively on space-based weapons—such as the co-orbital ASAT weapon once flight-tested and deployed by the former-Soviet Union. It is silent in regard to terrestrially-based ASAT weapons, which, as previously noted, constitute a significant threat to spacecraft.

Fortunately, there are constructive proposals for outer space TCBMs that satisfy the criteria established in the consensus GGE report. For example, the U.S. Strategic Command provides to both government and commercial sector satellite operators timely notifications of satellite close approaches. In this regard, the United States welcomes China's recent commitment to provide contact information necessary for Chinese entities responsible for spacecraft operations and conjunction assessment to receive urgent satellite collision warnings directly from the U.S. Strategic Command's Joint Space Operations Center.

Also, the United States believes that European Union efforts to develop an International Code of Conduct for Outer Space Activities can serve as the best near-term mechanism for States to implement many of the GGE's recommendations. Over the past two years, the United States has actively participated in the European Union-sponsored Open-Ended Consultations in Kyiv, Bangkok, and Luxembourg. We now look forward to working next year with the European Union and the international community in an inclusive process to finalize a Code of Conduct that enhances the long-term sustainability, safety, stability and security of the space environment. In addition to continued informal exchanges at the CD in Geneva, the United States supports consideration of the GGE recommendations by the UN Disarmament Commission during its 2015-2017 cycle.

These "top-down" measures to enhance stability can be complemented by "bottom-up" efforts to ensure the long-term sustainability of outer space activities. The United States welcomes the decision by the Committee on the Peaceful Uses of Outer Space (COPUOS) to consider the GGE report during its 58th session in June 2015. This review can reinforce the importance of ongoing efforts of COPUOS to mitigate space debris and develop new guidelines for improved spaceflight safety and collaborative space situational awareness.

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4. Multilateral Efforts to Ensure a Safe and Sustainable Space Environment

On November 21, 2014, Deputy Assistant Secretary of State Rose addressed a conference in London on promoting space security and sustainability. His remarks are available at *www.state.gov/t/avc/rls/2014/234392.htm*. Excerpted below are his comments regarding multilateral efforts to ensure a stable and safe environment in space.

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Given these threats and the current era where many States and nongovernmental organizations are harnessing the benefits of outer space, we have no choice but to work with our allies and partners around the world to ensure the long-term sustainability of the space environment. We also must speak clearly and publicly about what behavior the international community should find both acceptable and unacceptable. Over the past few years, the United States has worked to support a number of multilateral initiatives that seek to establish consensus guidelines for space activities that are both in the national security interests of the United States, and will further the long-term stability and sustainability of the space environment.

Just last year, I served as the United States expert on a United Nations Group of Governmental Experts (GGE) study of outer space transparency and confidence-building measures (TCBMs). The consensus GGE report which was published in July of last year endorsed voluntary, non-legally binding TCBMs to strengthen sustainability and security in space. The GGE benefited immensely from the contributions of Professor Richard Crowther of the U.K. Space Agency, who worked with several other experts to define a rigorous set of criteria for considering space TCBMs. This work contributed to the GGE's recommendation that States implement measures to promote coordination to enhance safety and predictability in the uses of outer space. The report also endorsed "efforts to pursue political commitments, for example, a multilateral code of conduct, to encourage responsible actions in, and the peaceful use of, outer space."

This International Code of Conduct for Outer Space Activities is another important multilateral initiative. Among the Code's commitments for signatories is to refrain from any action which brings about, directly or indirectly, damage, or destruction, of space objects and to minimize, to the greatest extent possible, the creation of space debris, in particular, the creation of long-lived space debris. The Code could also help solidify safe operational practices, reduce the chance of collisions or other harmful interference with nations' activities, contribute to our awareness of the space environment through notifications, and strengthen stability in space by helping establish norms for responsible behavior in space.

Lastly, the UN Committee on the Peaceful Uses of Outer Space (COPUOS) is also doing important work to move forward in the development of new international long-term sustainability guidelines. U.S. and U.K. experts from the private sector as well the federal

government have played a leading role in the COPUOS Working Group on the Long-term Sustainability of Outer Space Activities. These efforts contribute to the development of multilateral and bilateral space TCBMs. Exchanges of information between space operations centers also can serve as useful confidence building measures.

Multilateral diplomatic initiatives contribute greatly to defining acceptable and unacceptable behaviors in space and therefore are key components of the United States deterrence strategy. In addition, if we are serious about maintaining the space environment for future generations, we must support such measures that promote positive activities in space and further the creation of norms which dissuade countries from taking destabilizing actions such as the testing of debris-generating ASAT systems. By working with the international community, we can, and must, advance the long-term sustainability and security of the outer space environment for all nations and future generations.

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5. Applicability of International Legal Framework for Space to Commercial Space Activities

In September 2014, Kenneth Hodgkins, Director of the Office of Space and Advanced Technology, U.S. Department of State, addressed the Commercial Space Transportation Advisory Committee. His remarks are excerpted below.

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A number of U.S. companies have recently announced plans for unprecedented activities in outer space, including on-orbit satellite servicing and exploitation of lunar and asteroid resources. Such activities implicate the international legal framework for space in novel ways, and have inspired extensive academic commentary on the manner in which international law shapes (or even precludes) these activities. Accordingly, a number of companies have approached the Administration—through formal and informal channels—seeking guidance as to whether and how their planned activities are constrained by the international obligations or foreign policy interests of the United States. Although some of these activities remain years if not decades in the future, we understand the desire for greater legal clarity in the near term to attract investment.

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Of central importance to commercial space activities is Article VI of the Outer Space Treaty, which provides in relevant part:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of the present Treaty. The activities of non-governmental entities in outer space, including the Moon

> and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.

Article VI was among the more contentious provisions during the negotiation of the Outer Space Treaty. The Soviet Union strongly favored a formulation that would have limited space activities to governmental entities. The United States, which had plans at that point for privately operated telecom satellites, fought for a formulation preserving the possibility of non-governmental space activities. The compromise is what we have in Article VI: non-governmental activities are permitted, but require authorization and continuing supervision by the appropriate State Party to ensure they are carried out in conformity with the Treaty.

The United States implements this Article VI obligation through licensing programs administered by three agencies: the FAA licenses launch and reentry; the FCC licenses broadcast from space; and NOAA licenses remote sensing of the Earth. This national regulatory framework is adequate for existing commercial space activities—launch services, communications and remote sensing satellites—but it is not clear that it is adequate for all newly contemplated commercial activities on the horizon.

As the entity responsible for ensuring compliance with the United States' international obligations, the State Department is actively working with the interagency to determine how best to align the Government's regulatory authority in space with our international obligation to regulate non-governmental space activities. …

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Cross References

Piracy, **Chapter 3.B.6.**
Proliferation Security Initiative, **Chapter 19.E.**